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Columbia U.S. Export Assistance Center
1201 Main Street, Suite 1720
Columbia, SC 29201
Tel: 803-765-5345 Fax: 803-253-3614
Columbia.Office@mail.doc.gov
www.buyusa.gov/southcarolina

**DEPARTMENT OF HOMELAND SECURITY DELAYS RULE
REQUIRING AUTOMATED FILING OF SHIPPERS EXPORT DECLARATION DATA®**
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An interagency dispute is delaying implementation of a rule mandating that all export data requiring a Shippers export declaration (SED) be filed through the Automated export System (AES) or AESDirect.

While the Census Bureau (part of the Commerce department) is ready to publish the rule, last-minute objections by the department of Homeland Security (which includes Customs & Border Protection) have derailed that plan. It has been reported that the State department, whose approval is also required, signed off on the final rule.

Census, the authorizing agency for the rule, published a proposed mandatory AES rule back in February 2005. The plan was to release a final rule by the end of that year. It was later pushed back to the first quarter of 2006. The intent of the rule is to implement provisions of the Foreign Relations Authorization Act.

Two Objections by DHS

News of the interagency dispute began leaking out in March 2006, including at the International Compliance Professionals Association's (ICPA: www.icpainc.org) third annual conference on March 9 and in major trade publications soon afterwards. However, there have been no official statements by Commerce or DHS.

DHS's objections to the final mandatory AES rule center on two key issues:

- Confidentiality of SED data. DHS is demanding that the confidential business data collected from SEDs be shared with foreign governments, raising fierce opposition in the trade and concern at Census, which has a long record of working with exporters, carriers, and forwarders to

build confidence regarding its efforts to ensure secure handling of confidential business information. DHS wants to share this data with other federal agencies and foreign governments that are signatories of the World Customs Organization (WCO) Framework Agreement.

- Post-departure filing (AES Option 4). DHS also objects to several proposed changes to the post-departure filing requirement. Specifically, DHS wants either total elimination of post-departure filing or substantial limitations on eligibility for any new Option 4 participants. DHS also seeks to eliminate the final rule's "grandfathering" of companies that have already undergone a comprehensive and arduous qualification process to qualify for Option 4.

Exporters side With Census and Commerce

Among the protests that have been voiced within the trade against the DHS demands are the following:

American Association of exporters & Importers (AAEI): On March 10, AAEI wrote Commerce Secretary Gutierrez supporting his department's positions regarding AES Option 4 and confidentiality of exporters' business trade data. "We believe that an examination of the economic impacts, for both the U.S. trade community and the overall U.S. economy, resulting from these wholesale changes in U.S. policy would reveal issues requiring thorough review," argues the AAEI letter. "Further, frankly, we suggest that an examination of the unintended consequences of both, despite their obviously well-intentioned development, should lead to their immediate reconsideration," the letter—extracts of which we printed in the AAEI Alert of March 20, 2006—continues.

AAEI notes that exporters who have qualified for late-departure filing use Option 4 to meet specific real-world business needs. Requiring further extensive vetting of exporters who have already qualified for Option 4, according to AAEI, would result “disruption to both established business process and the global supply chain.” Regarding the demand by DHS to share SED business data, the association’s letter to Secretary Gutierrez notes that AAEI members are very concerned about the potential of expanded use of proprietary trade data—such as cost, among others—which does not provide the government with enhanced ‘situational awareness’ for targeting shipments with certain anomalies and characteristics.”

AAEI expresses alarm over such data being exchanged “with other federal agencies as well as foreign governments in ways that are not designed to guarantee the confidentiality which American business has come to rely upon its government agencies to provide in this increasingly globally competitive environment.” AAEI adds that “many governments have invested substantially in business enterprises which directly compete with the U.S. private sector,” further raising concerns by U.S. exporters regarding such data sharing.

AAEI argues for publication of the mandatory AES rule without incorporation of the DHS objections. If that is not feasible, the trade association urges that a review of the broader economic impact of finalizing the rule be conducted by the administration. AAEI notes that the changes demanded by DHS “will affect the ability of nearly 91,000 small businesses identified by the Census Bureau as a U.S. principal party in interest (USPPI) to export goods and change their business processes to handle such shipments.”

National Customs Brokers and Forwarders Association of America (NCBFAA):

On March 1, NCBFAA also wrote Gutierrez, requesting that he reject the DHS demands. “We need hardly remind you of the consequences of competition sensitive export information flowing freely to foreign governments and then perhaps on to our competitors overseas,” states the letter. NCBFAA argues that: “Commerce’s stewardship of American exports is being

challenged.” The letter also argues that Option 4 poses no threat to U.S. security.

“The demand for proprietary export data, on the other hand, is designed to meet CBP’s negotiations within the World Customs Organization, a commitment made without consultation with Commerce and without a change in the law,” the letter adds. NCBFAA also calls on Gutierrez to publish the final rule minus the DHS requirements.

SED Confidentiality: What’s the Law?

Information collected through the SED or AES is exempt from public disclosure unless the Secretary of Commerce determines that such exemption would be contrary to the national interest under the provisions of Title 13 of the U.S. Code, Chapter 9, Section 301(g). Authority to make such an exemption has been delegated to Census, which has consistently taken the position that sharing such information is not in the national security interest.

Within DHS, it is presumably CBP that is pushing for authority to exchange such data with some of its foreign opposite numbers to advance its global security compliance initiatives. CBP is apparently also under pressure to mutually share such data with governments that are partnering with the agency in security programs such as its Container Security Initiative (CSI).

The concern of U.S. exporters, obviously, is whether the foreign governments concerned, a number of which directly own or invest in firms that compete with U.S. exporters, would bend the rules to allow such data to go to their companies or lack security measures to prevent such leakage”). Exporters have also raised the issue of whether overseas counterparts to the U.S. Freedom of Information Act could be used to pry such data loose from their own customs organizations.